Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PETER BIONDO, *et al.*,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

W. MARY STOWELL
LINDA D. FRIEDMAN
J. BRYAN WOOD
STOWELL & FRIEDMAN, LTD.
321 S. Plymouth Court
Chicago, IL 60604
(312) 431-0888

THOMAS E. JOHNSON
Counsel of Record
ANNE MEGAN DAVIS
LESLIE ANN JONES
JOHNSON JONES SNELLING
GILBERT & DAVIS, P.C.
36 S. Wabash Street
Chicago, IL 60603
(312) 578-8100

Counsel for Petitioners

191425

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In a bifurcated reverse discrimination class action lawsuit brought under the Equal Protection Clause of the Constitution and 42 U.S.C. § 1983, as well as under Title VII of the Civil Rights Act of 1964, the district court found that the City of Chicago discriminated against white firefighters in making promotions. Nineteen plaintiff-intervenors presented their cases on damages to two juries, which returned individual verdicts based on findings of fact for each plaintiff. The court of appeals affirmed the finding of liability, but reversed with respect to damages, after calculating the plaintiffs' average likelihood of promotion.

The questions presented are:

1. Does the Seventh Circuit's imposition of its own evaluation of damages evidence without offering plaintiffs the option of a new jury trial violate the Reexamination Clause of the Seventh Amendment and this Court's holding in *Hetzel v. Prince William County, Virginia*, 523 U.S. 208 (1998).

2. Does the Seventh Circuit's application of the caps in Title VII on compensatory damages for emotional distress violate the Reexamination Clause of the Seventh Amendment, this Court's holding in *Hetzel,* and well-established principles of common law, in addition to conflicting with the courts of appeal for the Ninth, Eleventh and District of Columbia Circuits, all of which have held that the Title VII caps do not apply to discrimination claims that are not brought under Title VII.

LIST OF PARTIES

Petitioners are plaintiff-intervenors Peter Biondo, John Byrne, Timothy Corcoran, Brian Gilhooly, Patrick Joyce, Thomas Maliska, Bernard McDevitt, David McElroy, Michael Timothy, Martin Wirtz, Richard Cloud, Michael Gacki, Clifford Gartner, George Healy, Steven Kolecki, Michael Oliver, John Piwinski, Thomas Tervanis and Victor Walchuk. Respondent is the City of Chicago.

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Petitioners Peter Biondo *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in its opinion dated August 27, 2004, insofar as that court vacated the relief awarded to petitioners.

OPINIONS BELOW

The opinion of the court of appeals is reported at 382 F.3d 680. App., *infra*, 1a-18a. The district court's order adopting the jury's findings on liability is dated October 4, 2000. The district court's memorandum opinion directing entry of judgments for ten of the petitioners ("the Biondo petitioners") is dated February 28, 2002. App., *infra*, 19a-41a. The district court's memorandum opinion directing entry of judgment for the remaining nine petitioners ("the Cloud petitioners") is dated May 30, 2002. App., *infra*, 42a-63a.

STATEMENT OF JURISDICTION

The district court's judgments with respect to liability for the class, and relief for the Biondo petitioners and the Cloud petitioners constitute final judgments pursuant to Fed. R. Civ. Pro. 54(b). The City timely appealed and the court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals' judgment was entered on August 27, 2004. Petitioners' timely petition for rehearing was denied on September 21, 2004. App., *infra*, 64a-65a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides in relevant part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C § 1981a(b)(3) provides:

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party —

> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000;
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

STATEMENT OF THE CASE

A. The Underlying Litigation.

This is a civil action alleging unlawful discrimination by the City of Chicago's Fire Department in its promotion of firefighters to the rank of Lieutenant. Petitioners are nineteen white firefighters who took the City's 1986 Lieutenant's examination ("the 1986 exam"). The City went to great lengths to ensure that the exam was valid and that all candidates had an equal chance of succeeding. But the City was unhappy with the raw scores the candidates received. Based on these scores, although 29% of the test-takers were African-American or Hispanic, only 12% of the 300 promotions to Lieutenant that the City anticipated making would have gone to minority firefighters. The City therefore increased the scores of the minority firefighters and decreased the scores of all non-minority firefighters who took the 1986 exam. The City also created two separate lists, one for white firefighters and one for minority firefighters. The City then promoted in rank order from the two lists. As a result, each petitioner was either delayed or entirely denied promotion to Lieutenant from the 1986 exam.

If the City had not adjusted the scores on the 1986 exam for race, each of the nineteen petitioners would have been promoted to Lieutenant from that exam.

The eligibility list from the 1986 exam was retired in 1991.[1] Long periods of time elapse between examinations.

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1. Fourteen of the petitioners were denied promotion from the 1986 exam. The remaining five were promoted, but the promotion of each was delayed beyond the date when he would have been promoted but for the City's race-based adjustment of the scores.

After the 1986 exam, petitioners' next opportunity to be promoted to Lieutenant was from a new examination given in 1993, a wait of seven years. Another six years elapsed (until 1999) before the next Lieutenant's exam was given. After a candidate is promoted to Lieutenant, he or she must take further examinations (when they are given) in order to be promoted to Captain. In addition, the candidate must have accumulated sufficient experience as a Lieutenant. A Captain's exam was given in 1991, but not again until 1998. As with promotion from Lieutenant to Captain, a further examination and sufficient experience are prerequisites for promotion to Battalion Chief. A Battalion Chief's exam was given in November 1993 but not again until 1998. Thus, the City's unconstitutional delay or denial in promoting petitioners to Lieutenant in 1986 had a significant effect on each petitioner's career path.

In 1988, the union representing the firefighters filed a lawsuit against the City. The nineteen petitioners were members of an intervening class of non-minority firefighters whose scores the City had decreased on the 1986 exam and who thus had been delayed or denied promotion to Lieutenant in violation of the Equal Protection Clause, 42 U.S.C. § 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The district court certified the class of intervenors.

In October 2000, a trial on liability was conducted before a jury, which returned a verdict for the class. The district court adopted the jury's determination and entered judgment in favor of the class, finding that the City's action in adjusting the scores on the basis of race discriminated against the class of non-minority firefighters.

The case then proceeded to the damages phase. Petitioners presented their individual cases on damages in two separate jury trials, one for the Biondo petitioners and one for the Cloud petitioners, respectively.[2] Petitioners presented evidence regarding each petitioner as well as evidence with respect to all firefighters who took promotional exams.

For each petitioner, the juries determined the probability that, but for the delay or denial in promotion to Lieutenant on the 1986 exam, the petitioner would have been promoted to Captain and, if so, the date on which this promotion would have occurred. The juries also determined the probability that each petitioner would have been promoted to Battalion Chief from Captain and, if so, the date on which the promotion would have occurred. The juries calculated damages for loss of pay for each petitioner. The juries also returned verdicts for compensatory damages for the emotional distress suffered by each petitioner as a result of the discrimination.

The district court thereafter held a bench trial on front pay, lost pensions, and prejudgment interest. The district court denied the City's post-trial motions for judgment as a matter of law pursuant to Fed. R. Civ. Pro. 50 with respect to both liability and damages. The district court also denied the City's motions for new trials pursuant to Fed. R. Civ. Pro. 59, or for remittitur.

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2. A number of the other plaintiff-intervenors settled with the City. The remaining plaintiff-intervenors have not yet presented their cases on damages.

B. The Appeal.

The City appealed both liability and damages. The Seventh Circuit upheld the determination of liability in favor of petitioners, but vacated the juries' awards of relief. Although acknowledging that, "[s]ome of [the juries'] findings are hard to quarrel with" (App., *infra*, 8a), the appellate court then reversed *all* the juries' findings, holding that the "evidence did not permit quantification of the chance lost by being held back in 1986." App., *infra*, 12a. The Seventh Circuit concluded:

> [W]e vacate the entire judgment and remand for a new trial limited to the calculation of back pay and damages for emotional distress on the assumption that each of the plaintiffs who has yet to reach captain lost a 33% chance of promotion by 2002.

App., *infra*, 14a. With respect to the juries' findings of compensatory damages resulting from emotional distress, the Seventh Circuit held:

> The district judge should see to it that any awards of compensatory damages for mental distress are proportional to the wrongs — and to the caps added by [42 U.S.C. § 1981a(b)(3)]. They do not apply directly to injury before 1991, but much of the harm post-dates that legislation.

App., *infra*, 14a. The court also directed that the district court's front pay awards be reduced in accordance with the appellate court's calculation of a 33% average lost chance of promotion for every petitioner. App., *infra*, 15a.

REASONS FOR GRANTING THE PETITION

This case raises profound Seventh Amendment issues that require the intervention of this Court. This Court has carefully delineated the role of a court of appeals in reviewing and altering a jury verdict. *Hetzel v. Prince William County, Virginia,* 523 U.S. 208 (1998). The court of appeals here ignored the Constitutional limits on its authority to reexamine facts that two juries had determined. Rather, the court calculated an average likelihood of promotion and substituted that finding as, in effect, a remittitur, without offering petitioners the option of a new trial. The appellate court thus acted in violation of the Reexamination Clause of the Seventh Amendment.

The Seventh Circuit also improperly usurped the juries' role in determining each petitioner's compensatory damages for emotional distress by requiring that such damages be compared to the limits on compensatory damages in Title VII, 42 U.S.C. § 1981a. That section, however, does not apply to cases for violations of constitutional rights brought under 42 U.S.C. § 1983 and, furthermore, was never intended by Congress to impose a sliding scale of compensation for wrong-doing. The Seventh Circuit's holding conflicts with those of the courts of appeal for the Ninth, Eleventh and District of Columbia Circuits on this issue. Moreover, that section does not apply to claims that pre-date its enactment, regardless of when the harm occurred.

The Seventh Circuit's opinion has effectively deprived petitioners of their Seventh Amendment right to have a jury determine their individual damages and will render victims of race discrimination unable to receive full compensation for their injuries.

I. The Reexamination Clause of the Seventh Amendment Prohibits the Appellate Court From Imposing Its Own Calculation of Damages on Petitioners Without Offering Them the Option of a New Trial.

A. Imposing a Damage Calculation Without Offering Petitioners a Meaningful New Trial Improperly Imposes a Remittitur in Violation of the Seventh Amendment and This Court's Holding in *Hetzel*.

In *Hetzel*, this Court made clear that the Seventh Amendment forbids a court of appeals from forming its own opinion of damages and imposing that opinion on the plaintiff without offering the plaintiff the option of a new trial. In *Hetzel*, as here, the court of appeals determined that the evidence did not support a jury's damages award and ordered the district court to recalculate the damages based on the awards in two other cases. The court of appeals subsequently issued a writ of mandamus to the district court when the district court granted plaintiff Hetzel's motion for a new trial, and directed the district court to calculate damages without allowing the plaintiff a new trial. As this Court held, the court of appeals thereby imposed a remittitur without allowing the plaintiff a new jury trial on her damages. This Court held that such action "cannot be squared with the Seventh Amendment." 523 U.S. at 211. The Seventh Amendment prohibits the court from substituting its judgment for that of the jury regarding an issue of fact. *See, e.g., Sloan v. State Farm Mutual Automobile Ins. Co.*, 360 F.3d 1220, 1225 (10th Cir. 2004).

Similarly, the Seventh Circuit's holding here cannot be squared with the Seventh Amendment. To be sure, the Seventh Circuit remanded the case to the trial judge, but its remand on the issue of petitioners' likelihood of promotion, and hence calculation of backpay, was a mere formality.[3] This is shown by the fact that — as in *Hetzel* — remand on this issue was limited to a calculation.[4] This holding shows

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3. Petitioners sought a jury determination of backpay as damages pursuant to their allegation of a constitutional deprivation of rights brought pursuant to 42 U.S.C. § 1983. Although § 1983 itself does not address the right to a jury trial, the purpose of a § 1983 award is to compensate persons for injuries caused by the deprivation of constitutional rights. *Carey v. Piphus*, 435 U.S. 247 (1978). *See also Curtis v. Loether*, 415 U.S. 189, 194 (1974) (Seventh Amendment applies to actions enforcing statutory rights if the statute creates legal rights and remedies enforceable in an action at law). *See also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707-711 (1999) (noting that the character of § 1983 is vital to a Seventh Amendment analysis and that, as a general rule, monetary relief is legal and concluding that a plaintiff seeking money damages has right to a jury trial). The Civil Rights Act of 1991, which created the right to a jury trial for compensatory and punitive damages under Title VII, does not specifically address the right to jury trial on back pay and thus does not preclude it. 42 U.S.C. § 1981a(b) and (c). *See* Robert L. Strayer, *Asserting the Seventh Amendment: An Argument for the Right to a Jury Trial When Only Back Pay is Sought under the Americans with Disabilities Act*, 52 Vanderbilt L.Rev. 795 (1999)(concluding that backpay is properly analyzed as a legal remedy in the Americans with Disabilities Act — under which the remedies are the same as in Title VII — and thus gives rise to the right to a jury trial on the issue.) This Court has not decided the issue of whether, under Title VII, a plaintiff seeking backpay is seeking legal rather than equitable relief and thus is entitled to a jury trial on the issue. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253, n. 4 (1994).

4. Following the Seventh Circuit's rejection of petitioners' request for rehearing, in which petitioners argued that the court's (Cont'd)

a disregard for the Seventh Amendment's prohibition against reexamination of the facts by courts of appeal.

B. The Seventh Circuit's Required Calculation of "Average" Probability of Promotion Based on a "Lost-Chance" Theory Violates the Reexamination Clause.

The Seventh Circuit's requirement that the district court on remand employ a specific percentage for average likelihood of promotion from Lieutenant to Captain (*i.e.*, 33%) based on a "lost-chance" theory usurped the role of the juries in determining what each petitioner's career path would have been in the absence of discrimination. The "lost-chance" theory, broadly speaking, has developed in medical malpractice cases to allow plaintiffs who cannot establish causation under traditional principles (because they were already ill or injured) to obtain some recovery for injuries caused by a negligent defendant. In that context, the doctrine allows a plaintiff to be compensated for the extent to which the defendant's negligence reduced the plaintiff's likelihood of achieving a better outcome. *See Smith v. Parrott*, 175 Vt. 375, 378 (2003); *see also Crosby v. United States*, 48 F. Supp. 2d 924 (D. Alaska 1999) (collecting jurisdictions that have either adopted or rejected the lost-chance theory in its several manifestations in medical malpractice cases).

Transposing the lost-chance theory from its original application in malpractice cases to the calculation of damages for civil rights plaintiffs who have prevailed on liability in

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(Cont'd)
rulings violated *Hetzel*, petitioners on remand have submitted proposed jury instructions to the district court that are consistent with *Hetzel*.

employment discrimination cases is problematic. But the court of appeals' application of the theory here is clearly improper. That is because the Seventh Circuit not only rejected individualized damage calculations reached by two juries, it also resolved competing interpretations of the evidence, even as to what constituted the numerical "average" rate of success. The court determined an average probability of promotion to Captain of 33% for all petitioners. The court of appeals' requirement that the district court employ its percentage on remand prevents a jury from considering all the evidence, including such relevant matters as evidence concerning each petitioner, the effect that the illegal discrimination had on each petitioner's ability to perform on subsequent tests, other applicants' subsequent promotions, and, if appropriate, the calculation of an average rate of promotion.

In an earlier case, the Seventh Circuit itself admitted that calculating a plaintiff's probability of promotion was "more art than science." *Bishop v. Gainer*, 272 F.3d 1009, 1016 (7th Cir. 2001). In that case, there were a number of plaintiffs, as well as the person who was actually promoted, and only one open position. The court approved the district court's evaluation of the pertinent factors involved in assessing each plaintiff's likelihood of promotion. But the Seventh Circuit here has retreated from its earlier position and applied the concept in a way that ignores relevant evidence of an individual's likelihood of promotion, including the effect the discrimination had upon his ability to perform well in subsequent exams. The court thereby created a wholly false illusion of mathematical precision that deprived each petitioner of his right to a jury's determination. Because there were many more open Captain and Battalion Chief positions than there are petitioners, the juries could fairly have decided that each one would have been promoted

to Captain and beyond if the City had not discriminated against him. Probabilities of promotion when there are more than enough job openings for every petitioner to advance presents a classic question of fact that the Seventh Circuit has improperly taken from the jury. Even if it is appropriate to calculate an average rate of success, where there are competing interpretations of the evidence, that task must be left to the jury.[5] The Seventh Amendment does not allow the court of appeals to act as the fact-finder in our federal system.

II. The Seventh Circuit's Holding on Compensatory Damages Runs Afoul of the Seventh Amendment and Impermissibly Limits Damages for Emotional Distress.

A. The Seventh Circuit's Required Application of a "Lost-Chance" Calculation to Petitioners' Compensatory Damages Abandons Traditional Tort Concepts of Damages for Emotional Distress.

Petitioners' claims for compensatory damages for their emotional distress were presented to the two juries pursuant to 42 U.S.C. § 1983. The purpose of § 1983 is to compensate persons for injuries caused by the deprivation of constitutional rights. *See Carey v. Piphus*, 435 U.S. 247 (1978). Damages for emotional distress may include such injuries as personal humiliation, impairment to reputation, and mental anguish and suffering. *See, e.g., Memphis Community School District v. Stachura*, 477 U.S. 299, 307 (1986).

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5. For example, the jury must determine in this case whether petitioners' "average" rate of success should be calculated based on a denominator limited just to the 1986 exam takers or to all exam takers.

Under well-established principles of common law, a tortfeasor must take the victim as he finds him, a doctrine sometimes described as the "eggshell plaintiff" principle. *See Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1294-95 (8th Cir. 1998) (collecting cases). The underlying theory is that different plaintiffs experience different levels of pain and suffering from similar incidents and an individual plaintiff is entitled to be compensated for all the emotional distress the defendant caused that plaintiff. *See McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 506 (1st Cir. 1996) (defendant must take the victim as he finds him, whether extraordinarily sensitive or not); *Tompkins v. Cyr,* 202 F.3d 770, 780 (5th Cir. 2000) (same); *Lust v. Sealy, Inc.,* 383 F.3d 580, 589 (7th Cir. 2004) (same). This is true in cases alleging deprivation of constitutional rights as well.

The Seventh Circuit's holding here assumes, to the contrary, that the compensatory damages must be measured by the wrong the defendant has perpetrated. This holding thus misperceives the purpose of compensatory damages, which is to compensate the individual victim for the emotional distress that he himself has suffered. *See Carey v. Piphus, supra,* 435 U.S. 247 at 264, n.20 (emotional distress damages are "essentially subjective" and may be proven by reference to the injured party's conduct and testimony of others.)

It was thus improper for the Seventh Circuit to require a discount of petitioners' emotional distress awards to "average damages." The court itself recognized this in an earlier case, *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 822 (7th Cir. 1985). There the court held that discounting pain and suffering to some notion of "average" results in under-compensation of the victim and allows the tortfeasor a windfall. Our federal legal system has never imposed presumptive awards

for particular injuries. Yet that is precisely what the Seventh Circuit has now done by tying compensatory damages for emotional distress to the petitioners' presumed "average" chance of promotion. This turns the notion of compensation for the pain and suffering of the individual plaintiff based on his particular circumstances on its head.

B. The Seventh Circuit Improperly Requires Application of the Caps in Title VII to Emotional Distress Damages Awarded Petitioners Under 42 U.S.C. § 1983.

The appellate court's further holding that the district judge, on remand, must ensure that the damage awards for emotional distress in this § 1983 case must be proportional to the caps in Title VII, set forth in 42 U.S.C. § 1981a, misperceives the law as well. When Congress amended Title VII in 1991, it added the right to jury trial on compensatory and punitive damages. 42 U.S.C. § 1981a(c). Damages available under this section were capped based on the size of the employer. 42 U.S.C. § 1981a(b)(3). But § 1983 contains no such caps.

The Seventh Circuit's position puts it squarely at odds with other courts of appeals, which have explicitly rejected the application of the Title VII caps to § 1983 cases, even by analogy. *See Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (court will not apply the Title VII caps by analogy to employment discrimination cases under § 1983); *Swinton v. Potomac Corp.*, 270 F.3d 794, 820 (9th Cir. 2001) (Congress has not seen fit to impose recovery caps in § 1983 cases even though it has had ample opportunity to do so since the 1991 amendments to Title VII); *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 510

(9th Cir. 2000) (emotional distress damages were awarded under Washington state law, not under Title VII, and hence were not subject to Title VII caps). *See also Kim v. Nash Finch Co.*, 123 F.3d 1046, 1062 (8th Cir. 1997) (compensatory damages are capped under Title VII, but not in actions brought under another statute allowing damages for intentional race discrimination, 42 U.S.C. § 1981). *See also Gregory v. Shelby County, Tennessee*, 220 F.3d 433, 444 (6th Cir. 2000) (Title VII caps not part of discussion of compensatory damages award of $778,000 in a § 1983 case).

Indeed, the caps in Title VII should play no role, even by analogy, in determining emotional distress awards because they are not a measuring stick for such damages. The Seventh Circuit's holding that the caps are relevant puts the court in conflict with the District of Columbia Circuit, which rejected the argument that the caps in Title VII impose a sliding scale for emotional distress damages. *See Peyton v. DiMario*, 287 F.3d 1121, 1127 (D.D.C. 2002). The legislative history confirms that the caps were not intended to establish any such measure of the outrageousness of the discriminatory conduct, but simply varied with the size of the employer's labor force. 137 Cong. Rec. 29,059 (1991). There is simply no evidence that Congress intended to limit the amount of the relief available to victims of intentional race discrimination under the Equal Protection Clause and § 1983 when it expanded the right to jury trial for compensatory damages in Title VII. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001) (in amending Title VII in 1991, Congress determined that victims of employment discrimination were entitled to additional remedies and gave no indication it wished to curtail previously available remedies).

C. The Seventh Circuit's Holding on Compensatory Damages Violates the Reexamination Clause of the Seventh Amendment.

The Seventh Circuit's ruling also runs afoul of this Court's ruling in *Hetzel*. That case teaches that attempts by a federal court of appeals to limit jury verdicts based on an appellate court's creation of false caps on compensatory damages for emotional distress are prohibited by the Seventh Amendment. In *Hetzel*, the court of appeals had directed that the district court recalculate the plaintiff's award of damages for emotional distress in view of the awards in two other cases that the court of appeals thought were comparable. The court of appeals' order precluded plaintiff from receiving a new trial in which a jury would determine damages. This Court reversed because such an order "could not be squared with the Seventh Amendment."

Here, the Seventh Circuit only ostensibly allowed petitioners a new trial on compensatory damages for emotional distress. As in *Hetzel*, the appellate court's directive that, on remand, the district court must ensure that any damages for emotional distress must be proportional to the Seventh Circuit's finding of likelihood of promotion and to awards in other cases cannot be squared with the Seventh Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

W. MARY STOWELL
LINDA D. FRIEDMAN
J. BRYAN WOOD
STOWELL & FRIEDMAN, LTD.
321 S. Plymouth Court
Chicago, IL 60604
(312) 431-0888

THOMAS E. JOHNSON
Counsel of Record
ANNE MEGAN DAVIS
LESLIE ANN JONES
JOHNSON JONES SNELLING
GILBERT & DAVIS, P.C.
36 S. Wabash Street
Chicago, IL 60603
(312) 578-8100

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED AUGUST 27, 2004

IN THE UNITED STATE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 02-2707, 02-3099 & 03-1921

PETER BIONDO, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, ILLINOIS,

Defendant-Appellant.

ARGUED APRIL 2, 2004—DECIDED AUG. 27, 2004

Before EASTERBROOK, MANION, and WILLIAMS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Chicago's Fire Department has five ranks: firefighter, engineer, lieutenant, captain, and battalion chief. Promotions depend on competitive examinations. Chicago developed the 1986 exam for lieutenant (a position open to firefighters and engineers) with care to ensure that it was both non-discriminatory and a valid test of skills. Yet although 29% of those who took the exam

were either black or Hispanic, only 12% of those who received the highest 300 scores were in these groups. The Department concluded that this disparate impact could be justified, under the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4, only if the exam were valid for rank-order use—that is, if someone who scores higher on the test is bound to perform better than the person next in line. According to the Department's expert, this examination had a standard error of measurement of 3.5, which is to say that a person who scored 80 and took a similar test again could score as high as 83.5 or as low as 76.5 without implying that his skills and probability of success in the higher position had changed. Convinced that it could not make promotions from the 1986 list in rank-order fashion, the Department established what it called "standardized" lists and what most people would call racially segregated lists: it drew up one list for whites and another for blacks and Hispanics, and then made 29% of all promotions from the minorities-only list. The Department used these lists until 1991, promoting a total of 209 lieutenants from the 1986 exam.

This process meant that the promotion of some white candidates was delayed, and others were not promoted even though minority candidates with lower scores became lieutenants. Some of the disappointed applicants filed suit under 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964. The Department acknowledged that its approach can be sustained only if a compelling interest supports its use of race and ethnicity. See, e.g., *Adarand Constructors,*

Inc. v. Peña, 515 U.S. 200 (1995). It did not argue that either past discrimination or a quest for diversity supports its approach. Cf. *Grutter v. Bollinger,* 539 U.S. 306 (2003); *Petit v. Chicago,* 352 F.3d 1111 (7th Cir.2003). Chicago instead maintains that it had a compelling need to comply with federal regulations that frown on using tests to make promotions in strict sequence. The district court bifurcated liability from damages and conducted a trial before an advisory jury, which concluded that the Department violated both § 1983 and Title VII. In open court the district judge agreed with this conclusion. Two later jury trials (limited to 19 of the plaintiffs) led to substantial awards of compensatory damages plus equitable relief such as front pay. *Biondo v. Chicago,* 2002 U.S. Dist. LEXIS 3463 (N.D.Ill. Feb. 28, 2002); *Cloud v. Chicago,* 2002 U.S. Dist. LEXIS 9817 (N.D.Ill. May 30, 2002).

According to the Department, the jury's (and thus the judge's) finding that the 1986 exam was valid is clearly erroneous, see *Pullman-Standard v. Swint,* 456 U.S. 273 (1982), even though the trier of fact credited plaintiffs' statistical expert, who supported the exam's validity. *Bryant v. Chicago,* 200 F.3d 1092 (7th Cir.2000), sustains rank-order use of a similar exam, making it hard to see how the outcome of this trial could be deemed clearly erroneous. The Department acknowledges that the evidence taken in the light most favorable to the verdict shows the exam's overall validity as a test of skills but maintains that it does not demonstrate the propriety of making promotions in sequence, given the standard error of measurement. Even if the plaintiffs' expert undermined the conclusion that the standard

error of measurement is 3.5, the Department insists, the record does not show that the standard error is *zero,* and without such a finding (which would be impossible, as no exam predicts perfectly) the exam could not have been used to make promotions in rank-order sequence, given the disparate impact that would have ensued.

Let us suppose that the City has the better of the statistical argument on this record (perhaps the one compiled in *Bryant* did more to show the exam's validity). We shall suppose further that the EEOC's regulations tell employers not to hire or promote in strict sequence when that would cause minority groups to succeed less than 80% as often as whites. But see Paul Meier, Jerome Sacks & Sandy L. Zabell, *What Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule,* 1984 Am. Bar Foundation Research J. 139, 158-70. Still, the premise of the City's argument is that regulations supply a compelling governmental interest in making decisions based on race. How can that be? Then Congress or any federal agency could direct employers to adopt racial quotas, and the direction would be self-justifying: the need to comply with the law (or regulation) would be the compelling interest. Such a circular process would drain the equal protection clause of meaning. Decisions such as *Adarand Constructors* show that compliance with federal laws cannot automatically be a compelling interest; *Adarand Constructors* held a federal statute unconstitutional precisely because it required public officials to make use of race, and the statute was not *itself* supported by a compelling governmental interest. Chicago does not contend that

29 C.F.R. § 1607.4 carries out any compelling governmental interest, and given the holding of *Washington v. Davis,* 426 U.S. 229 (1976), that disparate impact in hiring or promotion by a public employer does not violate the equal protection clause, it is hard to see how such an argument could be constructed. If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm, and as a practical matter *Washington v. Davis* would be undone. Congress did not attempt this; to the contrary, it provided in 42 U.S.C. § 2000e-2(j) that an employer's desire to mitigate or avoid disparate impact does *not* justify preferential treatment for any group.

The Civil Rights Act of 1991 explicitly forbids the dualist response to disparate impact. 42 U.S.C. § 2000e-2(*l*). (That section also forbids differential validation, under which scores predicting an equal probability of success on the job lead to an equal probability of favorable decision even though this may mean that minorities are promoted with scores lower than those of white applicants. See *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) (approving use of differential validation under statutes then in force). The City did not attempt differential validation before resorting to standardization.) The 1991 Act does not apply retroactively, see *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), but new § 2000e-2(*l*) and old § 2002-2(j) jointly reveal that standardization cannot be an indispensable response to disparate impact. Public employers have other options. One will suffice here. Instead of making rank-order promotions, Chicago could have created bands reflecting the standard

error of measurement. For example, the Department could have treated all scores in the range 96-100 as functionally identical and made promotions by lot from that band; when all test-takers with those scores had been promoted, the Department could have pooled scores in the range 91-95 and promoted randomly from that group, and so on. That procedure would have respected the limits of the exam's accuracy while avoiding any resort to race or ethnicity. Given options of this kind, the City's two-list procedure cannot be thought compelled. Indeed, it is hard to credit the Department's assertion that it viewed rank-order promotions as unsupportable when that is how it actually used the exam. After creating racially segregated lists, the Department promoted *in rank-order sequence* from each list!

No more need be said about the merits. Remedies are more problematic. Each of the two juries was asked six questions: what was the likelihood that, but for the discrimination, each firefighter would have been promoted to captain and then battalion chief (and when each position would have been achieved); what damages represented loss of pay until the trial; and what damages were appropriate for emotional distress. The district judge then ordered the Department to make retroactive the positions of those plaintiffs who had achieved one or more promotions since 1986, and he granted front pay to those who (the jury found) would have been promoted further. The judge also ordered

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Details for one firefighter show how these findings translated into a judgment. Peter Biondo received $35,125 in prejudgment interest on the back-pay amount of $112,000. The court did not add interest to the damages for emotional distress. So money damages came to $272,125. Biondo had been promoted (after his success on a later exam) to lieutenant on February 16, 1998; the court ordered the Department to make this promotion retroactive to November 1, 1990, which provided Biondo with additional seniority and pension benefits. (This date was selected to leave an adequate gap before the promotion to captain, which the jury found would have occurred on August 16, 1993, but for the delay in Biondo's promotion to lieutenant.) Finally, the court ordered the Department to pay Biondo at the rate of a battalion chief for the period between March 1, 2002, and March 1, 2014, unless Biondo left the Department's employ earlier.

Some of these findings are hard to quarrel with. For example, Michael Timothy, whose promotion to lieutenant was delayed, made it to both captain (from the 1992 exam for that position) and battalion chief (from the 1994 exam); his damages reflect just a short delay in promotion and a bit of aggravation. Gacki and Wirtz became captains after the 1999 examination. But other findings are more problematic: the juries found that most of the plaintiffs were sure to be promoted even though, except for Gacki, Timothy, and Wirtz, they have failed to achieve advancement through the competitive process since becoming lieutenants (a position 15 of them managed to achieve, eventually, on their own: 5 by delayed promotion from the 1986 list, and 10 by promotion from later examinations). The finding that Gacki had a "0%" chance of becoming a captain is puzzling, as he actually

achieved that position in 1999. (This finding was the work of the second jury; the first jury concluded that Timothy and Wirtz, the others who already were captains, had a 100% probability of promotion to that position. Neither jury behaved inconsistently.) Then there is the inexplicable verdict concerning Michael Oliver: 90% likely to become a captain and certain to become a battalion chief, even though the latter promotion is impossible without the former.

The City does not dispute the district court's central approach: asking the jury to determine the probability that being held back in 1986 cost the plaintiffs later chances for advancement. This "loss of a chance" method is the best way to handle probabilistic injuries. See *Bishop v. Gainer,* 272 F.3d 1009, 1015-16 (7th Cir.2001); *Doll v. Brown,* 75 F.3d 1200, 1205-07 (7th Cir.1996); *Griffin v. Michigan Department of Corrections,* 5 F.3d 186, 189 (6th Cir.1993). If four people competing for one position lost an equal chance to get it, then each should receive 25% of the benefits available. Or if a person would have had a 25% chance of promotion from lieutenant to captain, then preventing that person from becoming a lieutenant should lead to a remedy equal to 100% of the benefits of being a lieutenant plus 25% of the incremental benefits of being a captain. (This assumes that all plaintiffs are risk neutral; in most cases, however, they would pay to reduce risk, so the proper award should be something less than the actuarial value—for promotion is uncertain. Neither side makes anything of this, however, so for simplicity we assume risk neutrality.)

Unfortunately, the juries' estimates do not reflect a plausible appreciation of the lost chances: the juries

concluded that every one of the plaintiffs who had not yet achieved a captaincy was *certain* to have done so— even though four plaintiffs had been unsuccessful in post-1986 attempts to become lieutenants, and 9 of the 15 plaintiffs who reached lieutenant had tried and failed to achieve higher ranks. (Timothy, Gacki, and Wirtz became captains after succeeding on exams; Corcoran, Joyce, and McElroy were promoted independently of the testing process, for reasons that the parties do not relate.) Even in a world of grade inflation, where teachers living far from Lake Wobegon think nothing of rating all students as "above average," it is hard to swallow a conclusion that *all* candidates held back from promotion to lieutenant in 1986 were sure to become captains. Remember that 209 firefighters were promoted to lieutenant from the 1986 exam. Plaintiffs ranked well below many of those 209, though high enough to have made the cut but for the preference given to minority firefighters. They are not the pick of the class, the people who regularly finish first on every exam. Of the 528 lieutenants who took the 1992 exam for captain (the first that these plaintiffs could have taken had they been promoted from the 1986 exam), only 136 (or 26%) were promoted. That one-in-four chance was the outcome for persons who, on average, had done *better* on the lieutenants' exam than plaintiffs (for even had they been promoted, they would have been in the bottom half of the 1986 lieutenant class). And of the 137 captains who took the 1994 exam for battalion chief, only 54 (or 41%) were promoted—though these juries concluded that 8 of our 19 plaintiffs had a 100% chance of promotion to battalion chief, and that another four had chances exceeding 41%.

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One must take into account the possibility of sitting for multiple exams: 132 lieutenants who were not promoted from the 1992 test for captain applied again in 1998; of these, 29 (or 22%) have been promoted. This suggests that of those lieutenants who take the captain's exam at all, about 33% are promoted either from the first exam or a second try (if they persist through a second exam, and one could extrapolate that around 40% of aspiring lieutenants could achieve promotion by taking the exam) three or more times. Still, this is a long way from the 100% success rate that the juries calculated for our 19 firefighters.

The verdicts imply that, if we were to look at the most comparable firefighters—say, the 25 who ranked immediately above the plaintiffs on the 1986 exam and were promoted to lieutenant as a result—we would find that all became captains no later than November 2000, and that most would be battalion chiefs today. The record does not reveal how these firefighters actually fared, and plaintiffs, who bear the burden of persuasion, suffer from the omission. The best evidence of the chance they *actually* lost is missing. Nonetheless the verdicts might be sustainable if evidence demonstrated that, despite finishing out of the top hundred who took the 1986 exam, these plaintiffs must have had a bad day and were really more likely to succeed than the average exam-taker. That only 3 of the 19 have become captains by examination (some after two chances, in 1992 and 1998), suggests otherwise.

The record does not contain any evidence comparing these plaintiffs with other firefighters. Each of the 19 elected to present a non-comparative case. Each testified that he loves

the work, strives to succeed, and studies hard for tests. Each presented evidence about his education and experience. Most presented family members and friends who testified to the long hours the plaintiff studied, the plaintiff's commitment to the fire department, and so on. This evidence does not permit quantification of the chance lost by being held back in 1986. Firefighters do not strive to meet an absolute standard; they compete against their colleagues. The other firefighters taking tests for higher positions *also* love the department and prepare thoroughly. Only a demonstration that these plaintiffs are much better at tests than their rivals would support a verdict that the chance lost was 100% or anything like it. Yet the plaintiffs bypassed their opportunity to introduce comparative evidence; and what evidence the record does contain—that these plaintiffs did not excel on the 1986 exam; that they have not done well on tests for promotion since then; that only 33% of those who were actually promoted to lieutenant by 1992, and pursued further promotion, made captain by 2002— undermines the verdicts. Even giving all of the evidence and inferences a reading favorable to plaintiffs, no reasonable juror could find that all were destined to become captains. The verdicts therefore cannot stand.

Because none of the plaintiffs presented comparative evidence, the view *most* favorable to the plaintiffs as a group is that each would have done as well as the average lieutenant on the 1992 and 1998 exams. This means that, but for the discrimination after the 1986 exam, 33% of the plaintiffs (or 6 of them) would have become captains by 2002 via examination. Three actually reached that level (and Timothy went on to battalion chief), and three more achieved a

captaincy in some other way, so the remaining 16 lost only 3 captaincies (or none, depending on how the non-competitive promotions are handled). Perhaps it is inappropriate to hold the promotions of some plaintiffs against the rest in this way; it depends on whether we view these 19 as *all* of the victims of discrimination (in which event at most 3 promotions were lost) or as a random sample of the victims (in which event the lost-chance figure should be applied person by person). The City takes the latter view, which is the more favorable to the 13 plaintiffs who have stopped short of captain. (These 19 are not the only victims; other firefighters have claims yet to be tried; their disposition has been postponed to await our decision concerning these firefighters.) Accordingly, on remand each of the 13 is entitled to all of the benefits he would have received from a timely promotion to lieutenant, plus 33% of the benefits available from promotion to captain. And as about 41% of captains eventually become battalion chiefs, the award for the 10 plaintiffs who the jury thought likely to achieve that goal could include about 14% of the benefits of that position (a 33% chance of becoming a captain times the 41% chance that a captain eventually will advance again).

Other remedies depend on the unsupported view that all 19 plaintiffs were sure to become captains. Promotion to battalion chief is possible only for captains, so the high probabilities assigned to battalion chief for 11 plaintiffs are untenable. The back pay awards depend on the probabilities (and dates) of these promotions; they too must be vacated. The awards of compensatory damages for emotional distress also are linked to the estimates of promotional likelihoods. As the district judge remarked, this is why the awards to

Timothy and Wirtz are relatively low: they suffered an insult and aggravation but were not held back significantly in their careers. The awards appear to be dominated by the jurors' belief that persons who should have been captains, and were stuck for a decade in the rank-and-file, suffered acute mental distress. Recognition that these plaintiffs were *not* destined for the captaincy doubtless would influence the evaluation of their degree of (justifiable) distress. Finally, the district judge's equitable orders (retroactive seniority and pensions, front pay) assume the validity of the jurors' conclusions. A change in the promotion probabilities and dates requires everything else to be redone. Consequently we vacate the entire judgment and remand for a new trial limited to the calculation of back pay and damages for emotional distress on the assumption that each of the plaintiffs who has yet to reach captain lost a 33% chance of promotion by 2002.

The district judge should see to it that any awards of compensatory damages for mental distress are proportional to the wrongs—and to the caps added by the 1991 Act. They do not apply directly to injury before 1991, but much of the harm post-dates that legislation. No matter how serious the offense, compensatory damages for discrimination covered by the 1991 Act cannot exceed $300,000. See 42 U.S.C. § 1981a(b)(3). The awards in this case reached $232,000 (to Tervanis), yet the emotional distress that these firefighters endured must be considerably less than that suffered by other victims of discrimination—some of whom lose their livelihood by racially motivated discharge, others of whom endure sexually or racially based harassment or assaults that can make a job a source of trauma and misery. Sometimes discrimination produces mental breakdowns and long-term

disability. See *Wilson v. Chrysler Corp.*, 172 F.3d 500 (7th Cir.1999); *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290 (7th Cir.1987). None of our plaintiffs suffered such substantial injuries. If awards even in these extreme cases are capped at $300,000, the award appropriate to discrimination that simply retards the rate of promotion must be considerably less in order to maintain proportionality. Compare *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir.1995), with *Fine v. Ryan International Airlines*, 305 F.3d 746 (7th Cir.2002).

This leaves front pay. The district court added 12 years' worth, at the highest position the jury projected for each plaintiff (provided that the plaintiff was still employed at the Department in 2002). The judge explained that this unusually long period was justified by the infrequency of promotional opportunities and the fact that the plaintiffs were too distracted by the litigation (and the wrong done them in 1986) to be effective exam-takers earlier. Front pay must be reduced to match the opportunity lost—so a person who lost a 33% chance to become a captain by 2002 is limited to front pay at 33% of that position's salary until it is achieved by examination. (To be precise, such a person gets the salary and benefits of the position actually held, plus 33% of the difference in salary and benefits between that position and captain.)

As for duration: we agree with the City that 12 years exceeds the scope of a district court's equitable discretion. The goal of front pay is to put the victim in the financial position he should have enjoyed, when circumstances make it inappropriate to direct the employer to promote (or hire)

him. See, e.g., *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001); *Williams v. Pharmacia,* 137 F.3d 944, 954 (7th Cir.1998); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1212 (7th Cir.1989). This means, we observed in *Williams,* that front pay cannot extend past the time a reasonable person needs to achieve the same or an equivalent position in the absence of discrimination. Even if the lingering effects of discrimination hindered promotional opportunities until trial in 2002, front pay cannot logically continue after the next unimpeded promotional opportunity—the first post-2002 exam for captain (for those plaintiffs who were lieutenants in 2002) or battalion chief (for those who had become captains). The opportunity to seek promotion then gives each plaintiff everything to which he is entitled; a lieutenant or captain who does not achieve a competitive promotion no longer can blame his status on discrimination that delayed (but did not prevent) promotion to lieutenant. Setting this limit also gives plaintiffs an incentive to compete for promotions, unlike the district court's remedy, which all but guaranteed plaintiffs the highest possible salary through retirement without the need to seek advancement or perform the duties of the higher positions.

Perhaps what we have said will lead the litigants to resolve these remaining issues (and the remaining firefighters' claims) amicably rather than slug it out again in the courtroom. We hope so; this dispute is approaching its third decade. The judgments are vacated, and the case is remanded for proceedings consistent with this opinion.

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WILLIAMS, *Circuit Judge*, concurring. I concur in the result, given the arguments presented to us. I write separately to reiterate what the Supreme Court has made clear: "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter v. Bollinger,* 539 U.S. 306, 326-27 (2003). The City of Chicago's use of race in making promotional decisions is subject to strict scrutiny, meaning it is constitutional if necessary to fulfill a compelling government interest, so long as it is also narrowly tailored to further that interest. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995). As my colleagues note, we have recognized on numerous occasions that a governmental agency has a compelling interest in remedying its past unlawful discrimination. *See Majeske v. City of Chicago,* 218 F.3d 816, 819 (7th Cir.2000); *McNamara v. City of Chicago,* 138 F.3d 1219, 1221 (7th Cir.1998); *People Who Care v. Rockford Bd. of Educ.,* 111 F.3d 528, 535 (7th Cir.1997); *Billish v. City of Chicago,* 989 F.2d 890, 893 (7th Cir.1993) (en banc); *see also Erwin v. Daley,* 92 F.3d 521, 527 (7th Cir.1996) ("Courts have also held that a compelling state interest can be demonstrated by the use of statistical evidence of present discrimination plus a history of entry-level and promotional discrimination." (citations omitted)).

Yet unlike the position it has taken in other cases, the City did not defend its actions on the basis that it was remedying past discrimination in the Chicago Fire Department. *Cf., e.g., McNamara v. City of Chicago,* 138 F.3d 1219 (7th Cir.1998) (finding that non-rank order promotions in Chicago Fire Department were justified by City's past racial discrimination in employment of firefighters); *Chicago Fire Fighters Union Local 2 v.*

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	Probability of Promotion to Captain	Date of Promotion to Captain	Probability of Promotion to Battalion Chief	Date of Promotion to Battalion Chief	Back Pay	Damages for Emotional Distress	Years of Front Pay
Peter Biondo	100%	08/16/93	100%	04/16/00	112,000	125,000	12
John Byrne	100%	08/16/93	100%	04/16/93	96,000	125,000	12
Richard Cloud	100%	07/01/96	100%	02/16/02	99,159	182,000	12
Timothy Corcoran	100%	08/16/93	28%	--	167,000	125,000	12
Michael Gacki	0%	--	0%	--	5,992	94,100	0
Clifford Gartner	100%	07/01/96	51%	02/16/02	126,794	177,000	12
Brian Gilhooly	100%	08/16/93	100%	12/01/00	156,000	125,000	12
George Healy	100%	08/01/95	0%	--	92,053	130,000	12
Patrick Joyce	100%	08/16/93	57%	12/01/00	165,000	125,000	12
Steven Kolecki	100%	01/01/96	49%	02/16/02	55,513	104,000	12
Thomas Maliska	100%	11/16/00	14%	--	115,000	125,000	12
Bernard McDevitt	100%	11/16/00	0%	--	125,000	125,000	0
David McElroy	100%	08/16/93	86%	04/16/00	173,000	125,000	0
Michael Oliver	90%	08/16/93	100%	02/01/98	113,725	195,000	12
John Piwinski	100%	07/01/96	0%	--	78,381	145,000	12
Thomas Tervanis	100%	02/01/98	0%	--	100,509	232,000	12
Michael Timothy	100%	07/16/92	100%	07/01/99	24,000	10,000	0
Victor Walchuk	100%	08/16/93	100%	03/01/97	187,256	220,000	12
Martin Wirtz	100%	08/01/95	100%	04/01/00	89,000	20,000	10

Washington, 1999 U.S. Dist. LEXIS 20310, at *8 (N.D.Ill.Dec. 30, 1999) (defending non-rank order promotions as part of policy to remedy effects of past racial discrimination). Because the City made no argument that past discrimination was a factor in any decision related to the scoring of the 1986 examination, we are precluded from analyzing the case on this basis.

A nonremedial reason may also constitute a compelling interest supporting the use of race and ethnicity in employment decisions. For example, this court found that the Chicago Police Department had a compelling interest in having a diverse population at the rank of sergeant. *Petit v. City of Chicago,* 352 F.3d 1111, 1115 (7th Cir.2003); *cf. Grutter,* 539 U.S. at 329 (finding law school had a compelling interest in a diverse student body). We similarly recognized an operational need for persons of different races in the corrections environment. *Wittmer v. Peters,* 87 F.3d 916, 919 (7th Cir.1996). In this case, however, the City did not argue that the pursuit of diversity constituted a compelling interest.

Based on the arguments presented to us, I concur in the result on the merits. I am in full agreement with the decision to vacate the damage awards.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION DIRECTING ENTRY OF JUDGMENTS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED FEBRUARY 28, 2002

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 CV 3773

Judge James F. Holderman

PETER BIONDO, JOHN BYRNE, TIMOTHY CORCORAN, BRIAN GILHOOLY, PATRICK JOYCE, THOMAS MALISKA, BERNARD MCDEVITT, DAVID MCELROY, MICHAEL TIMOTHY and MARTIN WIRTZ,

Plaintiff-Intervenors,

v.

CITY OF CHICAGO,
a municipal corporation

Defendant.

MEMORANDUM OPINION DIRECTING ENTRY OF JUDGMENTS

On October 4, 2000, a jury returned a verdict in this case finding that the Chicago Fire Department ("CFD") 1986 Lieutenant's Examination did not discriminate against

minorities. That finding was supported by a preponderance of the evidence. That evidence established that the defendant City of Chicago ("City") was liable to the class of white plaintiff-intervenors whose promotions to the rank of Lieutenant in the CFD were delayed or denied as a result of the City's unconstitutional, intentional use of race in the making of the City's decisions regarding promotions to the rank of Lieutenant in the CFD from the CFD's 1986 Lieutenant's Examination Promotional List. After that verdict, discovery proceeded regarding the individual class members' respective damages claims. The jury trial of ten individual plaintiffs' damages claims commenced on February 11, 2002 before this court.

On February 20, 2002, the jury returned a verdict finding the amount of back pay damages owed by the City to each of the ten individual plaintiff class members. That jury also determined the emotional distress damages suffered by each of these ten individual plaintiffs. The jury additionally made specific findings as to the dates and probability each of the ten plaintiffs would have been promoted beyond the CFD rank of Lieutenant to the CFD rank of Captain, as well as the dates and probability each plaintiff would have been promoted to the CFD rank of Battalion Chief had each plaintiff's promotion to the CFD rank of Lieutenant not been delayed or denied by the City's intentional race discrimination.

While the jury was deliberating on its verdicts, this court heard further evidence pertinent to the equitable issues that are the court's duty to decide: reinstatement, front pay, pension benefits, and the application of prejudgment interest

to the jury's back pay determinations. Final arguments by counsel to the court on those equitable issues were commenced on February 21, 2002 and completed on February 28, 2002. This opinion plus the court's comments made in the open court proceeding on February 28, 2002 constitute this court's findings and conclusions on those equitable issues.

I. THE JURY'S VERDICTS

The jury's general verdicts as to the damages owed by the City to each plaintiff were follows:

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The jury's answers to the specific written questions posed to the jury regarding each plaintiff's promotional probabilities and probable dates of promotion had the City not delayed or denied each plaintiff's promotion to the CFD rank of Lieutenant were consistent with the procedure followed by the district judge in *Bishop v. Gainer,* 272 F.3d 1009, 1016 (7th Cir.2001) and were as follows:

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Before deliberating on these verdicts, the jury was properly instructed on the law. Among those instructions, the jury was told:

> In determining the amount of any damages, both the back pay damages and the emotional distress damages, that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages by way of punishment or through sympathy. You must not engage in speculation, conjecture or guess work. On the other hand, the law does not require that the Plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

The jury clearly heeded the instructions because the jury's verdicts as to each plaintiff's damages are each fully supported by the evidence, bear a rational connection to the evidence, are not excessive, and appear to be in no way the product of passion, *see DeBiasio v. Illinois Central Railroad,* 52 F.3d 678, 687-88 (7th Cir.1995); *Gorlikowski v. Tolbert,* 52 F.3d 1439, 1446 (7th Cir.1995). In fact, each of the jury's back pay findings is thousands of dollars less than the maximum plaintiffs' expert, Dr. Goldman, had estimated each plaintiff could receive as stated in Plaintiff's Exhibit 2A, which was admitted in evidence at the trial with "No objection" from defense counsel.

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Of the back pay and emotional distress damages awarded to each plaintiff, the jury appropriately awarded the least amount to plaintiff Michael Timothy who, despite the City's unlawful acts against him, ranked high enough on the 1986 Lieutenant's Exam Promotional List to be promoted to the rank of Lieutenant in the CFD on September 1, 1991. Michael Timothy, thereafter, attained the CFD ranks of Captain and Battalion Chief on August 16, 1993 and April 1, 2000 respectively. The jury found that if the City had not discriminated against him, Michael Timothy probably would have achieved the rank of Captain a year and a month earlier on July 16, 1992, and the rank Battalion Chief nine months earlier on July 1, 1999.

The next least back pay and emotional distress damages was awarded by the jury to the next highest CFD ranked plaintiff, Martin Wirtz, who also was promoted to the rank of Lieutenant on September 1, 1991 from the 1986 Lieutenant's Exam Promotional List despite the fact that the City had discriminated against him. Martin Wirtz attained the rank of Captain in the CFD nine years and three months later on December 16, 2000. The jury found plaintiff Martin Wirtz probably would have achieved Captain in less than four years on August 1, 1995, had the City not discriminated against him. The jury also found he probably would have achieved the rank of Battalion Chief by April 1, 2000. These finding are all well-supported by the evidence.

The back pay and emotional distress damage awards found by the jury in favor of each of the other eight plaintiffs were likewise reasonable and supported by fair inferences from the evidence. Although the City, after the jury's verdicts

were returned, presented in Defendant's Exhibit 7 the exact, to the penny, mathematical calculations of the amounts the City believes the jury should have awarded to each plaintiff in back pay, no request for such precision was made by the City or anyone to the jury. In fact, as stated earlier, the jury was instructed "mathematical precision" was not a requirement for the jury's verdicts. The jury, as it was entitled to do, rounded its damages figures to the nearest $1000.

The jury's verdicts clearly reflect a reasonable analysis of the damages evidence presented by each individual plaintiff in the case, both the back pay and emotional distress damages. The jury clearly and appropriately differentiated among the individual plaintiffs based upon the evidence relating to each of them such as their pertinent CFD promotional exam scores, their rankings and their record in the CFD, as well as the intangible factors, such as each individual plaintiff's dedication, determination, courage, and leadership skills. The jury's verdicts also fairly reflected the evidence as to the emotional distress caused to each of the plaintiffs by the City's discrimination. The jury through its answers to the interrogatories posed to it selected the probable dates of promotion for each plaintiff, as well as the probability of each plaintiff attaining the rank of Captain and the rank of Battalion Chief had the City not engaged in its wrongful conduct. The jury through its back pay awards to each plaintiff reflected the possibility of certain plaintiffs attaining the higher promotional rank earlier than the probable date, by awarding them less back pay, and the possibility of certain of the other plaintiffs attaining the higher promotional rank later than the probable date, by awarding more back pay, than the precise amounts proposed by the City's post-verdict in

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Plaintiff	*Back Pay Damages*	*Emotional Distress Damages*
Peter Biondo	$112,000	$125,000
John Byrne	$ 96,000	$125,000
Timothy Corcoran	$167,000	$125,000
Brian Gilhooly	$156,000	$125,000
Patrick Joyce	$165,000	$125,000
Thomas Maliska	$115,000	$125,000
Bernard McDevitt	$125,000	$125,000
David McElroy	$173,000	$125,000
Michael Timothy	$ 24,000	$ 10,000
Martin Wirtz	$ 89,000	$ 20,000

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Plaintiff	*Probability of Promotion to Captain*	*Probable Date to Captain*	*Probability of Promotion to to Battalion Chief*	*Probable Date to Battalion Chief*
Peter Biondo	100%	08/16/93	100%	04/16/00
John Byrne	100%	08/16/93	100%	04/16/00
Timothy Corcoran	100%	08/16/93	28%	None
Brian Gilhooly	100%	08/16/93	100%	12/01/00
Patrick Joyce	100%	08/16/93	57%	12/01/00
Thomas Maliska	100%	11/16/00	14%	None
Bernard McDevitt	100%	11/16/00	0%	None
David McElroy	100%	08/16/93	86%	04/16/00
Michael Timothy	100%	07/16/92	100%	07/01/99
Martin Wirtz	100%	08/01/95	100%	04/01/00

Defendant's Exhibit 7. As stated earlier, the jury's verdicts were well-reasoned and are supported by the evidence presented at the trial.

II. PREJUDGMENT INTEREST

Prejudgment interest has been recognized as an element of complete compensation and a normal incident of relief under Title VII. *Leoffler v. Frank,* 486 U.S. 549, 558 (1988). In the Seventh Circuit, prejudgment interest is within the discretion of the district court to award, but remains presumptively available to victims of federal law violations, *Hutchison v. Amateur Electronic Supply, Inc.,* 42 F.3d 1037, 1046-48 (7th Cir.1994); *Gorenstein Enterprises v. Quality Care-USA,* 874 F.2d 431, 436 (7th Cir.1989). These ten plaintiffs have had to wait since 1988 to have their claims adjudicated despite this court best efforts to get counsel to move this litigation along in a more timely manner. Although the City's counsel on pages 10 and 11 of "Defendant City of Chicago's Brief on Equitable Relief" filed on February 27, 2000, has tried to blame the delays in this case on counsel for the plaintiff-intervenors, this court will not in this opinion point the finger of blame for the delay in this litigation on one side or the other, a lot of factors have contributed, and the court has on earlier occasions expressed its frustration about counsel. The fact, however, remains that the whole time this case has been pending, the City has not had to act "as an uncompensated trustee or investment manger," *In re Milwaukee Cheese Wisconsin, Inc.,* 112 F.3d 845, 849 (7th Cir.1997), but has had the complete benefit and full use of the back pay amounts it has owed and has not paid to these plaintiffs. There has been no reason presented to this

court which is sufficient to overcome the presumption that prejudgment interest on the back pay amounts owed by the City to these ten plaintiff should be ordered as part of the judgments entered in favor of each of these plaintiffs and against the City at this time.

Unlike post-judgment interest, there, however, is no statutory rate of prejudgment interest. After entry of the individual judgment orders, the statutory post-judgment interest on each total monetary judgment will commence to accrue. As for the prejudgment interest, the parties here agreed on the calculational method that the court has used in computing the prejudgment interest which is part of the monetary damages owed by the City to each plaintiff. The amount was computed as the compound interest accumulated starting at August 1996 which is the midpoint of the general loss period on the full back pay damage award of each plaintiff using annual one-year U.S. Treasury obligation rates for each year of the period August 1996 to end of February 2002.

The following agreed upon annualized one-year rates were used.

1996 (5 months)	5.52%
1997	5.63%
1998	5.05%
1999	5.08%
2000	6.11%
2001	3.49%
2002 (2 months)	1.71%

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From these rates a prejudgment interest factor ("PIF") was determined by multiplying the annualized rates reduced to the number of months appropriate for each year. For the years 1997, 1998, 1999, 2000, and 2001, twelve months were used. For the year 1996, five months August through December, were used. For the year 2002, two months, January and February, were used because the judgment as to the ten plaintiffs in this the first of several trials on damages for the individual plaintiff class members could not be entered until the end of February 2002, because counsel for both sides needed additional time to present the parties' respective positions. The PIF calculation on the prejudgment interest amount is as follows:

PIF = (1.023) (1.0563) (1.0505) (1.0508)
(1.0611)(1.0349) ((1.00285) = 1.313619887

Using the PIF, the court has calculated the prejudgment interest owed by the City to each plaintiff as follows: each individual plaintiff's back pay, as determined by the jury's verdict to be owed by the City, was multiplied by the PIF and that individual plaintiff's back pay was then subtracted from that figure. The remaining amount is the prejudgment interest owed by the City to each plaintiff on that plaintiff's back pay. The individual back pay amounts which are due from the City to each plaintiff are stated on each individual plaintiff's judgment order which has been signed by the court and is directed to be entered herein.

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III. REINSTATEMENT

Under Title VII, this court is authorized "to order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as 2000e-5(g)(1)". Each plaintiff, according to the jury's verdicts and answers which are well-supported by a preponderance of the evidence, would have advanced beyond the CFD rank of Lieutenant. The parties had stipulated before the trial that each plaintiff would have become a Lieutenant had it not been for the City's discriminatory acts of first promoting others to Lieutenant on the basis of race.

Each plaintiff also was determined by the jury to have a 100% probability have attaining the CFD rank of Captain by no later than November 11, 2000. Eight of the ten plaintiffs had a probably of attaining the Captain's rank by August 16, 1993. Seven of those eight had a greater than 50% chance of becoming a Battalion Chief within the year 2000 or earlier, with five of those seven having a 100% probability of doing so by that time.

It is very understandable why each plaintiff requests the remedy of reinstatement to the rank each would probably have attained were it not for the City's wrongful conduct. The court certainly appreciates each plaintiff's position, but despite the jury's individual assessments of the probabilities of advancement based on the evidence, the reality is that no ranking commanding officer in the CFD who attained a promotion in rank because a federal judge ordered reinstatement to that rank would, receive the same the respect

and confidence from his subordinates and peers when making decisions and giving orders at the scene of a fire or elsewhere as another CFD officer who achieved his promotion in rank through his success on the rigorous promotional tests typically used by the CFD to determine career service promotions. Indeed, though each plaintiff deserves to hold the respective rank denied him by the City's unlawful conduct, this court, in considering all the equities including the public's interest, does not believe court-ordered reinstatement promotions in rank is an appropriate equitable resolution, beyond that to which the City has already agreed. That agreement by the City allows for the promotion of each plaintiff to the CFD rank of Lieutenant retroactive to the date each should have advanced to the rank of Lieutenant based on the 1986 Lieutenant's Exam Promotional List had the City not unlawfully discriminated against him. To attain the CFD career service rank which each plaintiff desires to have and to achieve the proper respect and confidence from peers, subordinates and the public, each of the plaintiffs, who have not already done so, will have to succeed on the appropriate CFD promotional exams and abide by the CFD promotional process conducted in a fair and unbiased manner. No other way of advancement in the CFD is equitably appropriate considering all of the equitable factors. Therefore, any further court-ordered reinstatement to higher CFD career service ranks, in this court's view, is equitably unavailable to these plaintiffs under the circumstances presented here.

IV. FRONT PAY

Because reinstatement to the higher CFD career service ranks which the jury found probably would have been attained

by these plaintiffs are, in this court's view, unavailable from an equitable standpoint, this court finds that awarding front pay which is reasonable in amount and duration is appropriate as an equitable remedy in lieu of reinstatement. The Seventh Circuit in *Williams v.. Pharmcia,* 137 F.3d 944, 951 (7th Cir.1998) stated:

> The district judge approached front pay as an equitable remedy, deciding it on his own rather than submitting it to the jury. We approve this course of action and join the other circuits that have held that front pay may be awarded under Title VII in cases where reinstatement is unavailable. See, e.g. *Reed v. A.W. Lawrence & Co ., Inc.,* 95 F.3d 1170, 1177 n. 7 (2d Cir.1996); *Winsor V. Hinckley Dodge, Inc.,* 79 F.3d 996, 1002 (10th Cir.1996); *Weaver v. Casa Gallardo,* 922 F.2d 1515, 1528 (11th Cir.1991); *Shore v. Federal Express Corp.,* 777 F.2d 1155, 1159 (6th Cir.1985).

As for determining the amount of front pay that equitably should be paid to each plaintiff, the evidence established that each plaintiff had a 100% probability of promotion to Captain in or before the year 2000, and that plaintiffs Peter Biondo, John Byrne, Brian Gilhooly, and Martin Wirtz had a 100% probability of being promoted to Battalion Chief by no later than the end of 2000. Therefore, the court finds that it is equitable and appropriate to award an amount of front pay starting March 1, 2002, the date of entry of judgment, to each of the plaintiffs who have not otherwise attained those respective CFD ranks. Therefore, the court believes that, in

lieu of reinstatement, starting on March 1, 2002, plaintiffs Timothy Corcoran, Patrick Joyce, Thomas Maliska, Bernard McDevitt, and David McElroy should commence receiving no less than a CFD Captain's salary as their regular periodic wages, and plaintiffs Peter Biondo, John Byrne, Brian Gilholly, and Martin Wirtz should commence receiving no less than a CFD Battalion Chief's salary as their regular periodic wages as the equitable front pay owed to them by the City.

As the Seventh Circuit also stated in *Williams, supra,* 137 F.3d at 951:

> Front pay in the Title VII context is best understood as "a monetary award equal to the gain [the plaintiff] would have obtained if reinstated." *Tobey v. Extel/JWP, Inc.,* 985 F.2d 330, 332 (7th Cir.1993); *see also Avitia v. Metropolitan Club of Chicago, Inc.,* 49 F.3d 1219, 1232 (7th Cir.1995) (describing front pay as "a substitute for reinstatement"). Generally, front pay is awarded as a substitute remedy only when reinstatement is inappropriate, such as when "There [is] no position available or the employer-employee relationship [is] pervaded by hostility." *McNeil v. Economics Lab., Inc.,* 800 F.2d 111,118 (7th Cir.1986), cert. denied, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987), *overruled on other grounds, Coston v. Plitt Theaters, Inc.,* 860 F.2d 834, 836 (7th Cir.1988).

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> Title VII explicitly authorized reinstatement as an equitable remedy; front pay is the functional equivalent of reinstatement because it is a substitute remedy that affords the plaintiff the same benefit (or as close an approximation as possible) as the plaintiff would have received had she been reinstated. As the equivalent of reinstatement, front pay falls squarely within the statutory language authorizing "any other equitable relief."

Of course, limiting front pay awards to a reasonable duration is appropriate. The goal of front pay is to replicate the amount of pay a plaintiff would have obtained had reinstatement been available. Id. at 953. A front pay award should only last until the employee can reasonably be expected to have moved on to similar or superior employment. *Id.* Applied to the facts here, the front pay amounts ordered by the court should only last so long as is reasonable to allow the plaintiffs to attain the actual CFD promotion to the upper CFD career service ranks which the facts showed each plaintiff would probably have previously attained had the City not intentionally engaged in race discrimination. The court believes that balancing the equities on an individual basis is necessary to fashion a proper and equitable result for each plaintiff as well as the City. Therefore, the court must consider all the pertinent factors in selection an equitable duration for the front pay ordered for each plaintiff in this case.

Of course, plaintiff Michael Timothy has already attained the CFD rank of Battalion Chief, so no front pay award to

him is warranted. He, however, is the only plaintiff of the ten to have attained the rank of Battalion Chief in the fourteen years this case has been pending. It took Michael Timothy eight and one-half years until April 1, 2000, after he was promoted to Lieutenant on September 1, 1991 to attain the Battalion Chief's rank through the CFD promotional process. Six and one-half years of that time was spent by Michael Timothy as a Captain, a position to which he was promoted on August 16, 1993. Michael Timothy's rise from Lieutenant to Captain from September 1, 1991 to August 16, 1993, a period of 23 months, is no longer possible because of a provision in the Labor Contact (Plaintiff's Exhibit 12-A, page 41) between the City and the Fire Fighters Union Local # 2. According to that contract a member of the CFD must occupy the position immediately below Captain and immediately below Battalion Chief for at least 30 months before a promotion is allowed to those respective ranks regardless of the promotional exam score achieved. Consequently, a total of 60 months or 5 years of waiting, first in the rank of Lieutenant before promotion to Captain, and then in Captain before promotion to Battalion Chief is possible.

Considering all the equitable factors the court believes that the City should pay front pay to the plaintiffs, who have not yet attained the CFD rank of Captain, for a period of twelve years, with such front pay periodic payments terminating if the plaintiff leaves the CFD before March 1, 2014, because the time it takes to make Captain then Battalion Chief is so long.

If any plaintiff desires to maintain that front pay salary level after the twelve years ordered herein, he will have to

attained the appropriate CFD rank within that time by taking, passing and scoring high enough on the appropriate CFD promotional exams to be promoted in the normal course by the CFD with the required 30 month minimal wait in each CFD career service position. This order provides each such plaintiff with the incentive and the opportunity to do so. Twelve years is a reasonable time to allow a plaintiff, who has not done so, to reach his desired CFD career service rank. The CFD Captain's and Battalion Chief's promotional examinations are given by the City about once every five to seven years. History has shown that the lists resulting promotional exams are used for the duration as the City desires. In fact, the City has complete and unfettered discretion, in determining the timing and nature of the CFD's promotional exams as well as in determining the number of persons promoted from a particular exam's results. The court believes the City will act in good faith and in compliance with the law. The court and the public expect no more and no less from the City.

Additionally, several of the plaintiffs, as shown by the evidence presented at the trial, still suffer from the emotional effects of the City's discrimination. It has been difficult for certain of the plaintiffs to study and succeed on the promotional exams which were given by the City while this litigation has been pending. Unfortunately, this litigation for these plaintiffs may not end with the entry of judgments. If the City appeals, at least two more years of anguish and uncertainty will be thrust into their lives Consequently, to accord each individual plaintiffs who has not attained the rank of Captain or Battalion Chief, a full and fair opportunity now to do so, a front pay period of twelve years is necessary.

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For Captain Martin Wirtz, who has already attained the CFD rank of Captain, the court believes ten years front pay is appropriate to allow him to attain Battalion Chief. He does not have some of the impediments other plaintiffs still have, but he along with the others may have to endure an appeal and the time associated with it if the City seeks an appeal from the judgments entered here.

Of course, when any plaintiff attains the higher promotional rank for which that plaintiff is awarded front pay under this court's orders, the City will be in compliance with this order by paying that promoted plaintiff his regular periodic wages at the CFD rank he has attained. No more is required. If by the end of the front pay period, a plaintiff has not attained the higher rank, then, after the front pay period has expired, the City need only pay that plaintiff the appropriate wages for whatever rank he has actually attained at the CFD.

V. PENSION BENEFITS

No plaintiff should be deprived of any pension benefits resulting from the City's intentional race discrimination against him. To allow such a result would not be a fair and equitable resolution of this case. Each plaintiff's circumstances is unique. Consequently, the court has fashioned, in the individual judgment order to be entered as to each plaintiff's individual claims, a remedy that takes into account the equitable positions of each individual plaintiff and the City. Bearing in mind that the pension rights and obligations of each plaintiff and the City are both statutory and contractual, the court, in fashioning each judgment order,

has attempted to evaluate the equities to rectify, to the extent possible, the City's wrongful conduct as shown by the evidence in the case.

The City's obligation, under this court's judgments, is to recognize and fund the appropriate pension for each individual plaintiff as set forth in the judgment order pertaining to that plaintiff. Each plaintiff's obligation is to provide the appropriate employee contributions to fulfill his funding requirements as he would have had to do if he had been promoted without the effect of City's discrimination. The ending time of retirement or separation from CFD active membership, whether separation is voluntary or as a result of disability, is likewise the result of the court's balancing the equities among the parties.

The court believes that a lump sum, discounted payment either as front pay or as pension benefits does not take into account that each of these plaintiffs have either remained fully employed by the CFD or are on duty disability from the CFD. Consequently, this court's intent is to have both the front pay and the pension benefits ordered in this case for each plaintiff to be affected by the future career decisions that plaintiff may make, as well as the timing of those decisions by each plaintiff. The goal of the court is to have the plaintiffs' front pay and pension benefits be provided to them, in the same manner as though each plaintiff had been promoted without the delay which resulted from the City's wrongful conduct.

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CONCLUSION

As this court stated in a comment it made at the conclusion of an earlier, lengthy trial of a group of cases between the City and numerous plaintiffs who were members of the CFD who, like these plaintiffs, had not been promoted in a timely manner because of the City's policy of affirmative action over a period of years:

> These non-minority plaintiffs suffered intentional discrimination by the CFD as did African-Americans and Hispanics in the past according to the evidence. The court empathizes with anyone who is victimized by discrimination and looks forward to that day when racial and ethnic discrimination, as well as the vestiges thereof, are truly in the past. *Chicago Fire Fighters Union Local No. 2 v. City of Chicago,* 1999 WL 1289125, *86 (N.D.Ill.)

Unfortunately, until this and other cases similar to it are fully resolved, the sting of race discrimination in the CFD will remain as a part of the lives of many of the CFD's members. Therefore, this court urges a prompt resolution.

For the reasons stated herein and in open court on February 28, 2002, the court directs that draft judgment orders stating this court's determinations as to each of the ten plaintiff-intervenor's damages claims presented at the February 2002 trial in this case be enter. The court, pursuant to Federal Rules of Civil Procedure 54(b), makes the express determination that there is no just reason for delay and

expressly directs the entry of judgment against the City and in favor of each individual plaintiff as set forth in the judgments orders signed this day by this court as to the claims of each of the ten plaintiffs whose claims have come on for trial in this case.

ENTER:

s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

APPENDIX C — MEMORANDUM OPINION DIRECTING ENTRY OF JUDGMENTS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 30, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 88 CV 3773
(Damages Trial No. 2)

Judge James F. Holderman

RICHARD CLOUD, MICHAEL GACKI, CLIFFORD GARTNER, GEORGE HEALY, STEVEN KOLECKI, MICHAEL OLIVER, JOHN PIWINSKI, THOMAS TERVANIS, and VICTOR WALCHUK,

Plaintiff-Intervenors,

v.

CITY OF CHICAGO,
a municipal corporation

Defendant.

MEMORANDUM OPINION DIRECTING ENTRY OF JUDGMENTS

On October 4, 2000, a jury returned a verdict in this case finding that the Chicago Fire Department ("CFD") 1986

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Lieutenant's Examination did not discriminate against minorities. That finding was supported by a preponderance of the evidence. That evidence established that the defendant City of Chicago ("City") was liable to the class of white plaintiff-intervenors whose promotions to the rank of Lieutenant in the CFD were delayed or denied as a result of the City's unconstitutional, intentional use of race in the making of the City's decisions regarding promotions to the rank of Lieutenant in the CFD from the CFD's 1986 Lieutenant's Examination Promotional List. After that verdict, discovery proceeded regarding the individual class members' respective damages claims.

On February 11, 2002, the trial of ten plaintiffs' damages claims began ("Damages Trial No. 1"). The jury returned its verdicts on February 20, 2002 and judgments were entered on March 1, 2002. On May 6, 2002, the jury trial as to the damages claims of the nine individual plaintiffs named in the caption above commenced ("Damages Trial No. 2"). On May 17, 2002, the jury returned a verdict in Damages Trial No. 2, as to the amount of back pay damages owed by the City to each of the nine individual plaintiffs in that trial. That jury also determined the emotional distress damages suffered by each of these nine individual plaintiffs. The jury additionally made specific findings as to the dates and probability each of the nine plaintiffs would have been promoted beyond the CFD rank of Lieutenant to the CFD rank of Captain, as well as the dates and probability each plaintiff would have been promoted to the CFD rank of Battalion Chief had each plaintiff's promotion to the CFD rank of Lieutenant not been delayed or denied by the City's intentional race discrimination.

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The court has considered the evidence pertinent to the equitable issues that all parties agree are the court's responsibilities to decide: reinstatement, front pay, pension benefits, and the application of prejudgment interest to the jury's back pay determinations. This opinion plus the court's comments made in open court at the conclusion of Damages Trials Nos. 1 and 2 constitute this court's findings and conclusions on those equitable issues.

I. THE JURY'S VERDICTS

The jury's general verdicts as to the damages owed by the City to each plaintiff were follows:

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The jury's answers to the specific written questions regarding each plaintiff's promotional probabilities and the probable dates of promotion had the City not delayed or denied each plaintiff's promotion to the CFD rank of Lieutenant were consistent with the procedure followed by the district judge in *Bishop v. Gainer,* 272 F.3d 1009, 1016 (7th Cir.2001) and were as follows:

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Before deliberating on these verdicts, the jury was properly instructed on the law. Among those instructions, the jury was told:

> In determining the amount of any damages, both the back pay damages and the emotional distress damages, that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages by way of punishment or through sympathy. You must not engage in speculation, conjecture or guess work. On the other hand, the law does not require that the Plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

The jury clearly heeded the instructions because the jury's verdicts as to each plaintiff's damages are each fully supported by the evidence, bear a rational connection to the evidence, are not excessive, and appear to be in no way the product of passion, *see DeBiasio v. Illinois Central Railroad,* 52 F.3d 678, 687-88 (7th Cir.1995); *Gorlikowski v. Tolbert,* 52 F.3d 1439, 1446 (7th Cir.1995).

The jury's verdicts clearly reflect a reasonable analysis of the damages evidence presented by each individual plaintiff in the trial, both the back pay and emotional distress damages. The jury clearly and appropriately differentiated among the individual plaintiffs based upon the evidence

relating to each of them such as their pertinent CFD promotional exam scores, their rankings and their record in the CFD, as well as the intangible factors, such as each individual plaintiff's dedication, determination, courage, and leadership skills. The jury's verdicts also fairly reflected the evidence as to the emotional distress caused to each of the plaintiffs by the City's discrimination.

II. PREJUDGMENT INTEREST

Prejudgment interest has been recognized as an element of complete compensation and a normal incident of relief under Title VII. *Leoffler v. Frank,* 486 U.S. 549, 558 (1988). The parties agreed in the Final Pretrial Order ("FPTO") that one of the contested issues in the case was the amount of prejudgment interest, if any, to which each plaintiff was entitled. (Damages Trial No. 2, FPTO, p. 18; p. 20). In the Seventh Circuit, prejudgment interest is within the discretion of the district court to award, but remains presumptively available to victims of federal law violations, *Hutchison v. Amateur Electronic Supply, Inc.,* 42 F.3d 1037, 1046-48 (7th Cir.1994); *Gorenstein Enterprises v. Quality Care-USA,* 874 F.2d 431, 436 (7th Cir.1989). These nine plaintiffs have had to wait since 1988 to have their claims adjudicated despite this court best efforts to get counsel to move this litigation along in a more timely manner. The whole time this case has been pending, the City has not had to act "as an uncompensated trustee or investment manger," *In re Milwaukee Cheese Wisconsin, Inc.,* 112 F.3d 845, 849 (7th Cir.1997), but has had the complete benefit and full use of the back pay amounts it has owed and has not paid to these plaintiffs. There has been no reason presented to this

court which is sufficient to overcome the presumption that prejudgment interest on the back pay amounts owed by the City to these nine plaintiff should be ordered as part of the judgments entered in favor of each of these plaintiffs and against the City at this time.

Unlike post-judgment interest, there, however, is no statutory rate of prejudgment interest. After entry of the individual judgment orders, the statutory post-judgment interest on each total monetary judgment will commence to accrue. As for the prejudgment interest, the parties here agreed on the calculational method that the court has used in computing the prejudgment interest which is part of the monetary damages owed by the City to each plaintiff. The amount was computed as the compound interest accumulated starting at August 1996 which is the midpoint of the general loss period on the full back pay damage award of each plaintiff using annual one-year U.S. Treasury obligation rates for each year of the period August 1996 to end of May 2002.

The following agreed upon annualized one-year rates were used.

1996 (5 months)	5.52%
1997	5.63%
1998	5.05%
1999	5.08%
2000	6.11%
2001	3.49%
2002 (5 months)	1.71%

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From these rates a prejudgment interest factor ("PIF") was determined by multiplying the annualized rates reduced to the number of months appropriate for each year. For the years 1997, 1998, 1999, 2000, and 2001, twelve months were used. For the year 1996, five months August through December, were used. For the year 2002, five months, January through May, were used because the judgment as to the nine plaintiffs in this the second of the trials on damages could not be entered until the end of May 2002. The PIF calculation on the prejudgment interest amount is as follows:

PIF = (1.0230) (1.0563) (1.0505) (1.0508) (1.0611) (1.0349) (1.0071) = 1.3192

Using the PIF, the court has calculated the prejudgment interest owed by the City to each plaintiff as follows: each individual plaintiff's back pay, as determined by the jury's verdict to be owed by the City, was multiplied by the PIF and that individual plaintiff's back pay was then subtracted from that figure. The remaining amount is the prejudgment interest owed by the City to each plaintiff on that plaintiff's back pay. The individual prejudgment interest amounts which are due from the City as to each plaintiff and which are to be stated on each individual plaintiff's judgment order are as follows:

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Plaintiff	*Back Pay Damages*	*Emotional Distress Damages*
Richard Cloud	$ 99,159.00	$182,000.00
Michael Gacki	$ 5,992.00	$ 94,100.00
Clifford Gartner	$126,794.00	$177,000.00
George Healy	$ 92,053.00	$130,000.00
Steven Kolecki	$ 55,513.00	$104,000.00
Michael Oliver	$113,725.00	$195,000.00
John Piwinski	$ 78,381.00	$145,000.00
Thomas Tervanis	$100,509.00	$232,000.00
Victor Walchak	$187,256.00	$220,000.00

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Plaintiff	*Probability of Promotion to Captain*	*Probable Date to Captain*	*Probability of Promotion to to Battalion Chief*	*Probable Date to Battalion Chief*
Richard Cloud	100%	7/1/96	100%	2/16/02
Michael Gacki	0%	——	0%	——
Clifford Gartner	100%	7/1/96	51%	2/16/02
George Healy	100%	8/1/95	0%	——
Steven Kolecki	100%	1/1/96	49%	2/16/02
Michael Oliver	90%	8/16/93	100%	2/1/98
John Piwinski	100%	7/1/96	0%	——
Thomas Tervanis	100%	2/1/98	0%	——
Victor Walchuk	100%	8/16/93	100%	3/1/97

Appendix C

III. REINSTATEMENT

Under Title VII, this court is authorized "to order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as 2000e-5(g)(1)". Each plaintiff, according to the jury's verdicts and answers which are well-supported by a preponderance of the evidence, who has not otherwise advanced, would have advanced beyond the CFD rank of Lieutenant. The parties had stipulated before the trial that each plaintiff would have become a Lieutenant had it not been for the City's discriminatory acts of first promoting others to Lieutenant on the basis of race.

It is very understandable why each plaintiff requests the remedy of reinstatement to the rank each would probably have attained were it not for the City's wrongful conduct. The court certainly appreciates each plaintiff's position, but despite the jury's individual assessments of the probabilities of advancement based on the evidence, the reality is that no ranking commanding officer in the CFD who attained a promotion in rank because a federal judge ordered reinstatement to that rank would, receive the same the respect and confidence from his subordinates and peers when making decisions and giving orders at the scene of a fire or elsewhere as another CFD officer who achieved his promotion in rank through his success on the rigorous promotional tests typically used by the CFD to determine career service promotions. Indeed, though each plaintiff deserves to hold the respective rank denied him by the City's unlawful conduct, this court, in considering all the equities including

the public's interest, does not believe court-ordered reinstatement promotions in rank is an appropriate equitable resolution, beyond that to which the City has already agreed. That agreement by the City allows for the promotion of each plaintiff to the CFD rank of Lieutenant retroactive to the date each should have advanced to the rank of Lieutenant based on the 1986 Lieutenant's Exam Promotional List had the City not unlawfully discriminated against him. To attain the CFD career service rank which each plaintiff desires to have and to achieve the proper respect and confidence from peers, subordinates and the public, each of the plaintiffs, who have not already done so, will have to succeed on the appropriate CFD promotional exams and abide by the CFD promotional process conducted in a fair and unbiased manner. No other way of advancement in the CFD is equitably appropriate considering all of the equitable factors. Therefore, any further court-ordered reinstatement to higher CFD career service ranks, in this court's view, is equitably unavailable to these plaintiffs under the circumstances presented here.

IV. FRONT PAY

Because reinstatement to the higher CFD career service ranks which the jury found probably would have been attained by these plaintiffs are, in this court's view, unavailable from an equitable standpoint, this court finds that awarding front pay which is reasonable in amount and duration is appropriate as an equitable remedy in lieu of reinstatement. The Seventh

Circuit in *Williams v. Pharmcia,* 137 F.3d 944, 951 (7th Cir.1998) stated:

> The district judge approached front pay as an equitable remedy, deciding it on his own rather than submitting it to the jury. We approve this course of action and join the other circuits that have held that front pay may be awarded under Title VII in cases where reinstatement is unavailable. See, e.g. *Reed v. A.W. Lawrence & Co ., Inc.,* 95 F.3d 1170, 1177 n. 7 (2d Cir.1996); *Winsor V. Hinckley Dodge, Inc.,* 79 F.3d 996, 1002 (10th Cir.1996); *Weaver v. Casa Gallardo,* 922 F.2d 1515, 1528 (11th Cir.1991); *Shore v. Federal Express Corp.,* 777 F.2d 1155, 1159 (6th Cir.1985).

As for determining the amount of front pay that equitably should be paid to each plaintiff, the evidence established that seven of the eight plaintiffs who had not already been promoted to the rank of Captain had a 100% probability of promotion to Captain in or before the year 1999, and that plaintiff Michael Oliver had a 90% chance of promotion to Captain on August 16, 1993. The jury also found that three of the plaintiffs had a 100% of being promoted to Battalion Chief: Richard Cloud on February 16, 2002; Michael Oliver on February 1, 1998; and Victor Walchuk on March 1, 1997. Additionally, the jury found Clifford Gartner had a 51% probability and Steven Kolecki had a 49% probability of promotion to Battalion Chief on February 16, 2002. Therefore, the court finds that it is equitable and appropriate to award an amount of front pay starting on May 31, 2002, the date of entry of judgment, to each of the plaintiffs who

have not otherwise attained those respective CFD ranks. Therefore, the court believes that, in lieu of reinstatement, starting on May 31, 2002, plaintiffs who have been determined to have lost a 100% chance to higher CFD rank should commence receiving no less than the CFD salary of that higher as their regular periodic wages, and each plaintiff who have been determined to have lost a less than 100% chance to a higher rank should receive in addition the lost percentage of the difference between the wages of the highest CFD he has either attained or had a 100% probability of attaining according to the jury's answers and the wages of the CFD highest rank he had any lost chance probability of attaining above 0%. This is the equitable front pay owed to each of them by the City.

As the Seventh Circuit also stated in *Williams, supra,* 137 F.3d at 951:

> Front pay in the Title VII context is best understood as "a monetary award equal to the gain [the plaintiff] would have obtained if reinstated." *Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 332 (7th Cir.1993); *see also Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1232 (7th Cir.1995) (describing front pay as "a substitute for reinstatement"). Generally, front pay is awarded as a substitute remedy only when reinstatement is inappropriate, such as when "There [is] no position available or the employer-employee relationship [is] pervaded by hostility." *McNeil v. Economics Lab., Inc.*, 800 F.2d 111,118 (7th

> Cir.1986), cert. denied, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987), *overruled on other grounds, Coston v. Plitt Theaters, Inc.*, 860 F.2d 834, 836 (7th Cir.1988).
>
> Title VII explicitly authorized reinstatement as an equitable remedy; front pay is the functional equivalent of reinstatement because it is a substitute remedy that affords the plaintiff the same benefit (or as close an approximation as possible) as the plaintiff would have received had she been reinstated. As the equivalent of reinstatement, front pay falls squarely within the statutory language authorizing "any other equitable relief."

Of course, limiting front pay awards to a reasonable duration is appropriate. The goal of front pay is to replicate the amount of pay a plaintiff would have obtained had reinstatement been available. *Id.* at 953. A front pay award should only last until the employee can reasonably be expected to have moved on to similar or superior employment. *Id.* Applied to the facts here, the front pay amounts ordered by the court should only last so long as is reasonable to allow the plaintiffs to attain the actual CFD promotion to the upper CFD career service ranks which the facts showed each plaintiff would probably have previously attained had the City not intentionally engaged in race discrimination. The court believes that balancing the equities on an individual basis is necessary to fashion a proper and equitable result for each plaintiff as well as the City. Therefore, the court must consider all the pertinent factors

in selection an equitable duration for the front pay ordered for each plaintiff in this case.

According to that contract a member of the CFD must occupy the position immediately below Captain and immediately below Battalion Chief for at least 30 months before a promotion is allowed to those respective ranks regardless of the promotional exam score achieved. Consequently, a total of 60 months or 5 years of waiting, first in the rank of Lieutenant before promotion to Captain, and then in Captain before promotion to Battalion Chief is possible.

Considering all the equitable factors the court believes that the City should pay front pay to the plaintiffs, who have not yet attained the CFD rank of Captain, for a period of twelve years, with such front pay periodic payments terminating if the plaintiff leaves the CFD before March 1, 2014, because the time it takes to make Captain then Battalion Chief is so long.

If any plaintiff desires to maintain that front pay salary level after the twelve years ordered herein, he must have attained the appropriate CFD rank within that time by taking, passing and scoring high enough on the appropriate CFD promotional exams to be pr moted in the normal course by the CFD with the required 30 month minimal wait in each CFD career service position. This order provides each such plaintiff with the incentive and the opportunity to do so. Twelve years is a reasonable time to allow a plaintiff, who has not done so, to reach his desired CFD career service rank. The CFD Captain's and Battalion Chief's promotional

examinations are given by the City about once every five to seven years. History has shown that the lists resulting promotional exams are used for the duration as the City desires. In fact, the City has complete and unfettered discretion, in determining the timing and nature of the CFD's promotional exams as well as in determining the number of persons promoted from a particular exam's results. The City has said that it intends to administer the next CFD Battalion Chief's exam in December 2002 or January 2003 and the next Captain's exam near the end of 2003. Although there are no guarantees, the court believes the City will act in good faith and in compliance with the law. The court and the public expect no more and no less from the City. However, even if the City were to administer the next CFD promotional exams as intended and each of the plaintiffs who have already attained the rank of Lieutenant were to take and pass the 2003 Captain's exam, the next Battalion Chief's exam will probably not be until 2008, and the promotions therefrom will probably continue through 2013. If any plaintiff taking the next CFD Captain's exam were not to be promoted from that exam, the next Captain's exam will probably not be until 2009 with promotions therefrom continuing through 2014.

Additionally, several of the plaintiffs, as shown by the evidence presented at the trial, still suffer from the emotional effects of the City's discrimination. It has been difficult for certain of the plaintiffs to study and succeed on the promotional exams which were given by the City while this litigation has been pending. Unfortunately, this litigation for these plaintiffs may not end with the entry of judgments. If the City appeals, at least two more years of anguish and uncertainty will be thrust into their lives while the case

remains pending on appeal. Consequently, to accord each individual plaintiff, who has not attained the rank of Captain or Battalion Chief, a full and fair opportunity now to do so, a front pay period to March 1, 2014 is necessary and equitable.

Of course, when any plaintiff attains the higher promotional rank for which that plaintiff is awarded front pay under this court's orders, the City will be in compliance with this order by paying that promoted plaintiff his regular periodic wages at the CFD rank he has attained. No more is required. If by the end of the front pay period, a plaintiff has not attained the higher rank, then, after the front pay period has expired, the City need only pay that plaintiff the appropriate wages for whatever rank he has actually attained at the CFD.

V. PENSION BENEFITS

No plaintiff should be deprived of any pension benefits resulting from the City's intentional race discrimination against him. To allow such a result would not be a fair and equitable resolution of this case. Each plaintiff's circumstances is unique. Consequently, the court has fashioned, in the individual judgment order to be entered as to each plaintiff's individual claims, a remedy that takes into account the equitable positions of each individual plaintiff and the City. Bearing in mind that the pension rights and obligations of each plaintiff and the City are both statutory and contractual, the court, in fashioning each judgment order, has attempted to evaluate the equities to rectify, to the extent

possible, the City's wrongful conduct as shown by the evidence in the case.

The City's obligation, under this court's judgments, is to recognize and fund the appropriate pension for each individual plaintiff as set forth in the judgment order pertaining to that plaintiff. Each plaintiff's obligation is to provide the appropriate employee contributions to fulfill his funding requirements as he would have had to do if he had been promoted without the effect of the City's discrimination. The ending time of retirement or separation from CFD active membership, whether separation is voluntary or as a result of disability, is likewise the result of the court's balancing the equities among the parties.

The court believes that a lump sum, discounted payment either as front pay or as pension benefits does not take into account that each of these plaintiffs have either remained fully employed by the CFD or are on duty disability from the CFD. Consequently, this court's intent is to have both the front pay and the pension benefits ordered in this case for each plaintiff to be affected by the future career decisions that plaintiff may make, as well as the timing of those decisions by each plaintiff. The goal of the court is to have the plaintiffs' front pay and pension benefits be provided to them, in the same manner as though each plaintiff had been promoted without the delay which resulted from the City's wrongful conduct.

Appendix C

CONCLUSION

As this court stated in a comment it made at the conclusion of an earlier, lengthy trial of a group of cases between the City and numerous plaintiffs who were members of the CFD who, like these plaintiffs, had not been promoted in a timely manner because of the City's policy of affirmative action over a period of years:

> These non-minority plaintiffs suffered intentional discrimination by the CFD as did African-Americans and Hispanics in the past according to the evidence. The court empathizes with anyone who is victimized by discrimination and looks forward to that day when racial and ethnic discrimination, as well as the vestiges thereof, are truly in the past. *Chicago Fire Fighters Union Local No. 2 v. City of Chicago,* 1999 WL 1289125, *86 (N.D.Ill.)

Unfortunately, until this and other cases similar to it are fully resolved, the sting of race discrimination in the CFD will remain as a part of the lives of many of the CFD's members. Therefore, this court urges a prompt resolution.

For the reasons stated herein and in open court, the court directs that draft judgment orders stating this court's determinations as to each of the nine plaintiff-intervenor's damages claims determined at Damages Trial No. 2 in this case be entered. The court, pursuant to Federal Rules of Civil Procedure 54(b), makes the express determination that there is no just reason for delay and expressly directs the entry of

judgment against the City and in favor of each individual plaintiff as set forth in the judgments orders signed this day by this court as to the claims of each of the nine plaintiffs whose claims came on for trial in May 2002 in this case.

ENTER:

s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

DATED: May 30, 2002

Plaintiff	*Back Pay Award*	*Prejudgment Interest*
Richard Cloud	$ 99,159.00	$31,650.25
Michael Gacki	$ 5,992.00	$ 1,912.57
Clifford Gartner	$126,794.00	$40,470.98
George Healy	$ 92,053.00	$29,382.11
Steven Kolecki	$ 55,513.00	$17,719.02
Michael Oliver	$113,725.00	$36,299.53
John Piwinski	$ 78,381.00	$25,018.19
Thomas Tervanis	$100,509.00	$32,081.16
Victor Walchuk	$187,256.00	$59,769.66

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED SEPTEMBER 21, 2004

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 21, 2004

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. ANN CLAIR WILLIAMS, Circuit Judge

Nos. 02-2707, 02-3099 & 03-1921

PETER BIONDO, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, ILLINOIS,

Party.

Appendix A

ORDER

Plaintiffs-appellees filed a petition for rehearing and rehearing en banc on September 10, 2004. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Rovner took no part in the consideration of this case.